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SUPREME COURT NO. _____

COURT OF APPEALS NO. 62700-7-1

SUPREME COURT OF THE
STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their martial community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON and HANNAH,

Petitioners,

v.

THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

The Petitioners respectfully request that this Court accept review of the Court of Appeals' December 28, 2009 decision. The Decision represents a disregard for well established Washington substantive law, rules of contract construction and basic Constitutional guarantees in favor of compelling compulsory, private, binding arbitration. As this Court recently affirmed in Satomi Owners Association v. Satomi, LLC, 167 Wn.2d 781, __ P.3d __, 2009 WL 4985689, the policy favoring enforcing arbitration agreements is not without limits.

This Petition presents issues of significant public interest impacting the rights and welfare of Washington residents and families as well as significant issues of law governing the making, interpretation and enforcement of consumer contracts containing arbitration provisions, which are prevalent throughout the State.

The Court of Appeals' Decision departs from established law by compelling the arbitration of claims of non-signatory children (some not born at the time their parents entered the agreements), disregarding substantial evidence of procedural unconscionability surrounding the formation of the agreements at issue, and creating a new right allowing a defending party to move for summary judgment on the merits without waiving the right to later seek to compel arbitration, if unsuccessful.

This Court's opinion in Satomi affirms that arbitration clauses are privity-dependent agreements and are to be interpreted and enforced by courts subject to the law governing contract formation. One court day later, the Court of Appeals issued its Decision in this case in conflict with Satomi. The Petitioners respectfully request that this Court accept review to resolve the current conflict in Washington law that is created by the Court of Appeals' Decision.

II. IDENTITY OF PETITIONERS

Petitioners Donia Townsend and Bob Perez, Paul and Jo Ann Ysteboe, Vivian and Tony Lehtinen and their minor children Niklas and Lauren, and Jon and Christa Sigafoos and their minor children Colton and Hannah (plaintiffs in the trial court and respondents on appeal) seek review of the published Court of Appeals' decision designated in Section II of this Petition.

III. COURT OF APPEALS DECISION

Petitioners seek review, pursuant to RAP 13.4, of the published decision of the Washington Court of Appeals, Division I, dated December 28, 2009, reversing the trial court's order denying motions to compel arbitration. The Decision has been published at __ Wn. App. ___, __ P.3d __, WL 5067457 (2009). A copy is attached as Appendix B. Petitioners

timely moved for reconsideration of the Decision and on February 8, 2010, the Court of Appeals denied their motion. Appendix C.

IV. ISSUES PRESENTED FOR REVIEW

A. Does the Court of Appeals' determination that the claims of minor, nonsignatory children of the Homeowners are subject to arbitration conflict with decisions of this Court and present an issue of substantial public interest because it disrupts the important balance between fundamental principles of contract law and the public policy in favor of enforcing agreements to arbitrate?

B. Does the Court of Appeals' refusal to consider substantial evidence of impropriety surrounding the formation of contracts containing arbitration clauses conflict with decisions of this Court, which require consideration of all of the circumstances surrounding contract formation in determining procedural unconscionability, and present an issue of substantial public interest regarding the proper adjudication of procedural unconscionability challenges to integrated arbitration provisions that are ubiquitous in modern commerce?

C. Does the Court of Appeals' determination that the defendants' unsuccessful motion for summary judgment on the merits did not waive any right to arbitrate conflict with other published Court of Appeals precedent and present an issue of substantial public importance because it authorizes and promotes forum shopping and undermines fundamental purposes behind Washington's arbitration scheme to provide parties with an efficient, non-judicial alternative for the resolution of disputes?

V. STATEMENT OF THE CASE

A. Factual Background.

This lawsuit involves claims by Homeowners and their minor children against defendants/respondents The Quadrant Corporation ("Quadrant"), Weyerhaeuser Real Estate Company ("WRECO") and Weyerhaeuser. The defendants design, develop, build and market

"planned residential communities" throughout western Washington. CP 9. Quadrant is a wholly-owned and controlled subsidiary of WRECO (and WRECO a wholly-owned and controlled subsidiary of Weyerhaeuser). CP 9. Defendants are the largest homebuilder in the State of Washington, having designed, built, marketed and sold thousands of homes in the Puget Sound region. CP 9. The Homeowners all purchased homes from Quadrant pursuant to Purchase and Sale Agreements ("PSAs") that contain integrated arbitration provisions. CP 48; 59; 178; 640.

In December 2007, plaintiffs Donia Townsend, Bob Perez, and Jo Ann Ysteboe filed a class action complaint against Quadrant, WRECO and Weyerhaeuser, alleging that Quadrant's 54 day construction process results in poor construction practices, moisture intrusion, and dangerous indoor air conditions including mold and harmful gases. CP 3-27. The Homeowners allege that Quadrant has known of these problems for years and has actively secreted these problems from home buyers and their families. CP 3-27. The Homeowners asserted on behalf of themselves, and similarly affected Quadrant Homeowners and their families, causes of action for outrage, fraud, negligent misrepresentation, violation of Washington's Consumer Protection Act, and negligence that resulted in bodily injury and property damage. CP 3-27. The Homeowners also challenged the arbitration provisions within Quadrant's Purchase and Sale

Agreements on procedural unconscionability grounds. CP 26.

Plaintiffs Vivian and Tony Lehtinen, their minor children Niklas and Lauren, Jon and Christa Sigafoos, and their minor children Colton and Hannah, later commenced similar lawsuits against Quadrant, WRECO, and Weyerhaeuser that included the same causes of action and also challenged the enforceability of the arbitration provisions contained within the Purchase and Sale Agreements. CP 232-52; 253-73. This lawsuit was later consolidated with the class action in February 2008. CP 143-44.

B. Procedural Background.

In January 2008, defendant Quadrant moved to compel arbitration. CP 28-35. Defendants Weyerhaeuser and WRECO moved for summary judgment dismissal of the Homeowners' claims on the merits. CP 790-801. The trial court denied Weyerhaeuser and WRECO's motions for summary judgment. CP 342.

Nearly six months after the trial court denied WRECO and Weyerhaeuser's motions for summary judgment, these defendants moved to compel arbitration of the consolidated cases. CP 213-25. Quadrant also moved to compel arbitration of the Lehtinen and Sigafoos actions. CP 197-212. In December 2008, the trial court denied all motions to compel arbitration and the defendants appealed. CP 735; 737-41.

On October 19, 2009, twenty two months after the consolidated Townsend/Ysteboe and Lehtinen and Sigafoos lawsuits were filed, the Court of Appeals issued its first published opinion in this matter. Appendix A. In it, the Court concluded that the arbitration provisions contained within the PSAs were not procedurally unconscionable, that the economic loss rule precluded arbitration of the Homeowners' tort claims, and that Weyerhaeuser and WRECO did not waive their right to arbitrate by moving for summary judgment on the merits. Appendix A. The court also ruled that the claims of the Homeowners' children (some of whom were not even alive at the time their parents executed the PSAs) were not subject to compulsory, private, binding arbitration of their claims. Id.

The Court of Appeals' opinion disregarded virtually all of the uncontroverted evidence submitted by the Homeowners regarding the circumstances surrounding the formation of the PSAs containing the compulsory, private, binding arbitration provisions. Appendix A at 14-15. Specifically, the Homeowners testified that Quadrant told them the terms of the PSAs were "not negotiable" and that they had to agree to all of the terms (including the arbitration clause) in order to purchase a Quadrant home. CP 133-34; 140; 674; 680-81. The Homeowners also testified that they were denied the opportunity to review and question the terms of the agreements before signing them. CP 133-34; 140; 674-75; 680-81. In some instances,

the Homeowners were only shown an electronic version of the agreement displayed on a computer screen at the Quadrant representatives' desks. They were not even given a hard copy to read, ask questions about, mark-up, or take for review. CP 132-33; 140. The Homeowners further testified that Quadrant's representatives failed to discuss the terms and provisions of the agreements. CP 140.

The Homeowners also testified that they were subjected to high pressure sales tactics. They were told they had to agree immediately (during the initial sales appointment) to purchase a home on Quadrant's terms (CP 133-34; 140; 673-74; 680-81) and that if they did not so agree, they would lose the chance to purchase a home altogether (CP 133; 674; 681). Other Homeowners testified that Quadrant "created a sense of extreme urgency and rushed us through the execution [of the PSA] process". CP 674. In one case, Quadrant told the Homeowner that if she "hesitated" agree to all of the terms of the PSA during the initial sales appointment, Quadrant would bump her to the end of the sales list and would raise the price of the home by $5,000 to $10,000. CP 674. In another case, "Quadrant's representative explained that if we did not sign a purchase and sale agreement that day, she expected that Quadrant would increase the purchase price of the home a minimum of $5,000 each month that we waited." CP 134.

The Homeowners also testified that they inquired about prior homeowner lawsuits against Quadrant and that Quadrant withheld material information regarding the lawsuits, including the true nature of the claims and Quadrant's knowledge of problems associated with its 54 day construction process. CP 132; 139. Other Homeowners testified that Quadrant failed to disclose any such information about the defects known to exist due to its construction process. CP 673-74; 679-81. In all cases, the Homeowners testified that had they been told the truth, they would not have agreed to an arbitration clause in the agreements (let alone purchase a Quadrant home). CP 132-33; 139; 673-74; 679-81.

The Homeowners also offered evidence that they were not provided with copies of the agreements even after being pressured to execute them. CP 134; 674; 681. In one instance, the Homeowners did not receive a copy of the signed agreement until 11 days after executing it. CP 134. This deprived the Homeowners of an opportunity to exercise any right of rescission they may have had.

Both the Homeowners and Quadrant moved for reconsideration. On December 28, 2009, the Court of Appeals denied the Homeowners' motion for reconsideration, granted Quadrant's motion, withdrew its prior opinion, and issued a new published opinion. Appendix B ("Decision"). In its revised Decision, the Court of Appeals adhered to its initial analyses

of the procedural unconscionability and waiver issues, but reversed itself to hold that even the tort claims of the Homeowners and the claims of their minor children are subject to arbitration. Decision at 17-18. The Homeowners timely moved for reconsideration. On February 8, 2010, the Court of Appeals denied the Homeowners' motion. Appendix C.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Argument.

The Supreme Court should accept review under RAP 13.4(b)(1) and (b)(4) because the Court of Appeals' Decision represents the growing trend in Washington jurisprudence to enforce arbitration provisions at the expense of fundamental, substantive legal principles and the Constitutional right to jury trial. The Court of Appeals incorrectly concluded that even the claims of nonsignatory children, who are not parties to the agreements containing the arbitration provisions, and some of whom that were not yet born when the agreements were entered, are subject to arbitration. The Decision's analysis is inconsistent with the general rule recently announced by this Court—that nonsignatories are generally not bound to arbitration agreements, except in limited circumstances, none of which were applied by the Court of Appeals. This issue is one of substantial public interest because the Decision disrupts the important balance between fundamental principles of contract law, the

Constitutional right to jury trial, and the public policy in favor of enforcing valid agreements to arbitrate.

This Court should also accept review because the Decision reflects the Court of Appeals' refusal to consider substantial evidence of impropriety surrounding the formation of contracts containing the arbitration clauses, which is in conflict with decisions of this Court that require the consideration of all evidence of the circumstances surrounding contract formation in determining procedural unconscionability. This is an issue of substantial public interest regarding the proper adjudication of procedural unconscionability challenges to integrated arbitration provisions that are ubiquitous in modern commerce.

Finally, the Decision's determination that corporate defendants did not waive their right to seek arbitration by first moving for summary judgment on the merits is in direct conflict with published Court of Appeals' precedent holding to the contrary. This is an issue of substantial public importance because the Decision authorizes and promotes forum shopping that undermines the fundamental purposes of Washington's arbitration scheme to provide parties with an efficient, non-judicial alternative for the resolution of disputes.

B. The Court of Appeals' Conclusion that Nonsignatory Children's Claims Are Subject to Arbitration is Contrary to Washington Law and an Issue of Substantial Public Interest.

The Court of Appeals erred when it determined that the claims of the children, who are nonsignatories to the Purchase and Sale Agreements, are also subject to arbitration. The general rule is that a nonsignator to an arbitration agreement cannot be compelled to arbitrate. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, __ P.3d ___, 2009 WL 4985689 (December 24, 2009). Arbitration is a matter of contract and a party cannot be required to submit to arbitration to resolve any dispute that he has not otherwise specifically agreed to submit to arbitration. Id., at *11. Washington law recognizes only two limited exceptions to the general rule that a nonsignator to an arbitration agreement cannot be compelled to arbitrate. Id., at *11. The limited exceptions are (1) that a nonsignatory can be bound where his claims are asserted solely on behalf of a signatory to the arbitration agreement; and (2) ordinary contract and agency principals, such as incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel. Id., at *11.

The Decision acknowledges that the Homeowners' nonsignatory children have asserted independent tort claims in this action, but also reasons that "the source of the duty of care Quadrant owed the

Homeowners and their children arises from the sale of the home." Decision at 18. The Decision concludes that the nonsignatory children's claims "relate to the PSA" and therefore are subject to the same "scope and analysis the trial court will conduct for the parents' claims." Id.

The Decision is contrary to Washington law because its stated basis for compelling arbitration of the children's claims does not fall within either of the two exceptions allowing nonsignatories' claims to be subject to privity-dependent arbitration clauses. Satomi, 2009 WL 4985689 at *11. Under Washington law, the inquiry is not whether the claims "relate" to the contract in some attenuated manner, but whether the nonsignatories base their right to sue on the contract itself. See Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 988 P.2d 12 (1999).

The children's claims are separate and distinct from their parents' claims and are in no way related to the PSAs. The children, some of whom were not even born at the time of the sale of the home, have an independent right to pursue injury claims against Quadrant regardless of any arbitration agreement between Quadrant and the Homeowners. Under the Court of Appeals' analysis, even claims asserted by secondary purchasers, nonsignatory children, residents, or guests would "relate to the PSA". This reasoning is contrary to Washington law and creates an issue of substantial public importance because it wrongfully deprives strangers

to the PSAs of their right to a jury trial. While arbitration provisions are generally favored, such provisions remain subject to basic contract principles and no principle recognized under Washington law supports the Decision's conclusion that Quadrant's arbitration provision can deprive infant children and other strangers to the PSAs of their right to trial. The Petitioners respectfully request that this Court accept review.

C. The Court of Appeals Failed to Follow Washington Law and Erroneously Analyzed the Homeowners' Claims of Procedural Unconscionability.

In its Decision, the Court of Appeals acknowledged that the "Homeowners specifically challenged the arbitration clause for procedural unconscionability", but characterized those challenges as consisting solely of a claim that the Purchase and Sale Agreements were contracts of adhesion. Decision at 14.

The Court of Appeals then discussed only some of the evidence offered by the Homeowners in support of their procedural unconscionability challenges, and ultimately characterized this evidence as "facts" that "relate to the PSA as a whole." Decision at 15. Because the Court of Appeals also reasoned that the issue of the enforceability of the PSAs is a matter reserved for an arbitrator, and that the "only facts relating specifically to the arbitration clause are that it was boilerplate and could

not be deleted from the agreement"[1], the Court of Appeals did not consider the vast amount of additional evidence of procedural unconscionability surrounding the formation of the Purchase and Sale Agreements containing the arbitration provisions. Decision at 15. Based on this limited evaluation of the evidence, the Decision held that the facts relating specifically to the arbitration clause were insufficient to establish procedural unconscionability. Decision at 15.

Under Washington law, procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction, including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print. Satomi Owners Association v. Satomi, LLC, __ P.3d___, 167 Wn.2d 781, 2009 WL 4985689 at *14. Procedural unconscionability relates "to impropriety during the process of forming a contract". Nelson v. McGoldrick, 127 Wn.2d 124, 131 896 P.2d 1258 (1995).

The Decision's analysis is inconsistent with Washington law and decisions of this Court, which demonstrate that a court, not an arbitrator,

[1] The record does not support the Decision's characterization of the evidence. As identified above, the Homeowners presented additional evidence specifically relating to the arbitration clauses themselves that the court disregarded and/or mischaracterized to reach its conclusion. See CP 132-34; 139-40; 673-74; 679-80.

must determine a procedural unconscionability challenge to an arbitration provision by analyzing both the evidence relating specifically to the provision as well as evidence of the circumstances surrounding the formation of the agreement containing it.

In McKee v. AT&T Corp., 164 Wn.2d 372, 394, 191 P.3d 845 (2008), the plaintiff challenged the enforceability of an arbitration provision contained within his Consumer Services Agreement with AT&T. McKee, 164 Wn.2d at 378-81. McKee challenged the arbitration clause on both procedural unconscionability grounds, arguing that he lacked a meaningful choice. McKee, 164 Wn.2d at 380-81.

On review, this Court rejected AT&T's argument that under the FAA, an arbitrator must decide issues of unconscionability. McKee, 164 Wn.2d at 394. This Court explained that "when the validity of the arbitration agreement itself is at issue, the courts must first determine whether there was a valid agreement to arbitrate." McKee, 164 Wn.2d at 394. This Court further explained that this rule applied because (like the Homeowners) McKee challenged only the unconscionability of the arbitration clause contained within a larger agreement. McKee, 164 Wn.2d at 394; see also CP 83; 87-90; 122-26; 691-96; 711 (Homeowners' opposed motions to compel arbitration on basis that arbitration provisions themselves (not the PSAs) are procedurally unconscionable); CP 763, 786

(Homeowners' complaints assert cause of action to invalidate arbitration provisions on unconscionability grounds).

Notably, the McKee Court analyzed all of the proffered evidence, including that relating to the formation of the Consumer Services Agreement as a whole, in reviewing the procedural unconscionability challenge to the arbitration provision within it:

> McKee was not provided with a copy of any agreement at the time he signed up for AT & T services. Even when a consumer contracts for a service electronically, the consumer has an opportunity to review the contract and is given the choice to "agree" before the contract is formed. AT & T apparently mailed the terms and conditions to McKee 10 days to two weeks after he subscribed for service. AT & T retained the right to unilaterally change the contract by posting the change on its web site or by mailing the notice of the change. A consumer was deemed to have agreed to the changes by continuing to use AT & T service whether the consumer had actual notice of the change or not. At no time was the consumer required to read and sign or affirmatively acknowledge acceptance of the terms and conditions.

McKee, 164 Wn.2d at 401-02 (citations and footnotes omitted).

Based on the analysis of the evidence surrounding the formation of the Consumer Services Agreement itself, this Court concluded that "[t]hese facts raise an issue of whether McKee had a reasonable opportunity to understand the terms and a meaningful choice." Id.

This Court recently employed a similar analysis in Satomi Owners Association v. Satomi, LLC, 167 Wn.2d 78, __ P.3d __, 2009 WL 4985689 (December 24, 2009). In Satomi, condominium owners

challenged the enforceability of an arbitration provision contained within a warranty addendum agreement on the basis that it was procedurally unconscionable. Satomi, 2009 WL 4985689 at *2, *13. The challenge to the arbitration provision consisted solely of a claim that the warranty addendum agreement itself was a contract of adhesion: "Blakely Association asserts that the warranty addendum is procedurally unconscionable because it is 'clearly a contract of adhesion,' a 'take it or leave it' contract." Id., at *13.

Once again, this Court analyzed the procedural unconscionability challenge to the arbitration provision based on evidence relating only to the adhesive nature of the contract as a whole:

> Blakeley Association merely claims that the warranty addendum is an adhesion contract. It fails to even argue the aforementioned factors relating to whether the unit purchasers had a meaningful choice. Therefore, we hold that Blakeley Association has failed to meet its burden of showing the warranty addendum is procedurally unconscionable.

Satomi, 2009 WL 4985689 at *14.

McKee illustrates, and Satomi confirms, that where there is a challenge to the enforceability of an arbitration provision contained within a larger contract, the court, not an arbitrator, must evaluate all evidence of the circumstances surrounding the formation of the contract in determining whether an arbitration provision is procedurally

unconscionable. Evidence of irregularity or impropriety surrounding the formation of a contract necessarily bears upon the enforceability of an arbitration provision contained within it. The Decision's failure to consider the substantial evidence of the questionable circumstances surrounding the formation of the PSAs containing the arbitration provisions is contrary to Washington law and should be reviewed.

D. The Decision Conflicts With Other Decisions of the Court of Appeals and Authorities Holding That A Party Waives Any Right to Seek Arbitration By First Moving for Summary Judgment on the Merits.

The Court of Appeals' decision should also be reviewed because it is in direct conflict with other published Court of Appeals' precedent holding that when a party moves for summary judgment on the merits, it waives any right to arbitrate.

The Decision acknowledges that WRECO and Weyerhaeuser moved for summary judgment "on the merits", but nevertheless concludes that these defendants did not waive the right to arbitrate by mischaracterizing the summary judgment motions as merely seeking a determination of whether these defendants were "proper parties". Decision at 4, 19. This distinction is both incorrect and irrelevant.

Under other published Court of Appeals authority, a party who chooses to litigate by moving for summary judgment on the merits waives

any right to later seek arbitration of the same claims. See Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn. App. 388, 395-96, 775 P.2d 960 (1989). A party waives arbitration by moving for summary judgment because the filing of the motion itself indicates the party's intent to proceed with litigation rather than seek arbitration. Id.

As reflected in the record, Weyerhaeuser and WRECO moved on the merits and sought dismissal of the Homeowners' claims with prejudice. CP 792-801. Weyerhaeuser and WRECO did not bring a Rule 12(b)(6) motion to dismiss. CP 792-801. They presented evidence outside of the pleadings to argue that they had no connection with the events giving rise to the Homeowners' claims. CP 793-96. More importantly, Weyerhaeuser and WRECO also sought summary dismissal of the Homeowners' claims on the basis that the Homeowners lacked evidence supporting the prima facie elements of each cause of action. CP 796-801. This is a quintessential motion for summary judgment on the merits. Indeed, had the trial court granted the motions, it would have resulted in the entry of a judgment on the merits in Weyerhaeuser and WRECO's favor that is no different in force or effect than a judgment entered after a trial—a final, appealable order, dismissing the claims with prejudice. Storey v. Shane, 62 Wn.2d 640, 384 P.2d 379 (1963).

By moving for summary judgment on the merits, Weyerhaeuser and WRECO elected to litigate these issues and waived any right to arbitrate. Naches Valley Sch. Dist. No. JT3, 54 Wn. App. at 395-96; accord Ritzel Communications Inc. v. Mid-American Cellular Telephone Co., 989 F.2d 966, (8th Cir. 1993); Kahn v. Parsons Global Servs., Ltd., 521 F.3d 421, 428 (D.C. Cir. 2008); Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc., 754 F.2d 457 (2nd Cir. 1985); State Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc., 969 F.2d 585 (7th Cir. 1982).

The Decision is not only in direct conflict with the law of waiver announced in another published Court of Appeals' decision, but it also presents an issue of substantial public importance because it improperly allows parties to forum shop by first moving for summary judgment on the merits yet later seek to compel arbitration of the same claims after the motions for summary judgment are denied. This is fundamentally incompatible with the policies authorizing and favoring arbitration as an efficient, non-judicial alternative mechanism to resolve disputes. This Court should accept review of this issue as well.

VII. CONCLUSION

For all of the reasons set forth above, the Homeowners respectfully ask this Court to accept review of these issues and reverse.

Respectfully submitted this 10th day of March, 2010

LYBECK MURPHY, LLP

By: _____

Lory R. Lybeck (WSBA #14222)
Brian C. Armstrong (WSBA #31974)
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Counsel for Petitioners

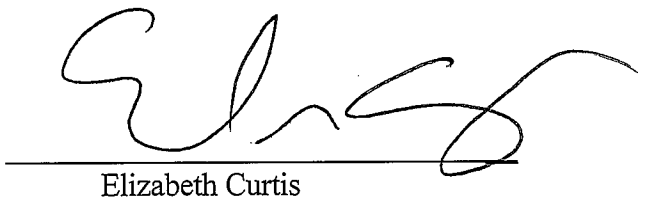
PROOF OF SERVICE

I, Elizabeth Curtis, declare that I caused to be filed with the clerk of the Court of Appeals, Division One, the foregoing Petition for Review, and served a copy of the same on counsel listed below by legal messenger.

Michael Scott
Laurie Lootens Chyz
Counsel for Respondents Quadrant, WRECO, and Weyerhaeuser
Hillis Clark Martin & Peterson PS
1221 Second Ave., Suite 500
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Mercer Island, Washington, this 10th day of March, 2010.



Elizabeth Curtis
Legal Assistant

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON and HANNAH, Respondents, v. THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation, Appellants.	No. 62700-7-I DIVISION ONE PUBLISHED OPINION Withdrawn FILED: October 19, 2009

Appelwick, J. — Four families who purchased homes built by Quadrant Corporation sued Quadrant and its parent corporations, Weyerhaeuser Real

Estate Company and Weyerhaeuser Corporation, for fraud, negligence, negligent misrepresentation, rescission, and a declaration of the unenforceability of the arbitration clause for unconscionability. The purchase and sale agreement (PSA) used in all four transactions contains a broad mandatory arbitration provision covering any controversy or claim arising out of or relating to breach of the PSA or any claimed defect. Quadrant appeals the order denying its motion to stay proceedings and to compel arbitration as a matter of right under RCW 7.04A.280(1)(a). Quadrant contends that an arbitrator, not a court, must decide whether the PSA was invalid for unconscionability.

RCW 7.04A.060(2) grants the court the authority to decide whether an agreement to arbitrate exists, so the trial court did not err in considering the validity of the arbitration clause. However, the facts alleged by the Homeowners do not support a finding that the arbitration clause itself was procedurally or substantively unconscionable. Under the arbitration statute, the arbitrator must decide whether a contract containing a valid agreement to arbitrate is enforceable. Because the arbitration clause itself is valid, we reverse and remand for the trial court to refer to arbitration those claims subject to the arbitration clause, and to determine whether to stay proceedings on any claims that remain with the court for resolution.

FACTS

Respondents (the Homeowners) purchased houses designed, built, and sold by appellants The Quadrant Corporation (Quadrant), Weyerhaeuser Real

Estate Company (WRECO), and Weyerhaeuser Company. The respondents are four married couples: Donia Townsend and Bob Perez (the Perezes); Paul and Jo Ann Ysteboe; Vivian and Tony Lehtinen, Jon and Crista Sigafoos, and the couples' children.[1] Quadrant is a wholly owned subsidiary of WRECO, and WRECO is a wholly owned subsidiary of Weyerhaeuser. Quadrant designs, develops, builds, and markets planned residential communities throughout Washington.

The Homeowners' declarations contain descriptions of the purchasing process, wherein they allege that Quadrant presented them with the PSA on a "take it or leave it" basis, used high-pressure sales tactics, withheld material information about other lawsuits against it, and precluded the Homeowners from reviewing the PSA before signing it electronically.[2] After purchasing and living in their homes and discovering the alleged defects, the Homeowners alleged that they had not received the homes they bargained for, paid for, or expected, as the homes were built in a rapid, assembly line style, allowing only 54 total working days for the entire production of each home. The Homeowners allege that the reckless construction process resulted in numerous construction defects, caused injury in the form of mold growth, pests, and poisonous gases, and violated the Consumer Protection Act[3] (CPA). The Homeowners sued the

[1] Initially, the Perezes and Ysteboes filed a class action complaint against Quadrant, WRECO, and Weyerhaeuser. The King County Superior Court consolidated the actions brought by the Sigafooses and Lehtinens into the Perez/Ysteboe class action suit in February 2008.
[2] The facts presented here are those alleged by the plaintiffs, as the trial court has not entered findings.
[3] Ch. 19.86 RCW.

defendants for fraud, outrage, violation of the CPA, negligence, negligent misrepresentation, rescission, breach of warranty, and a declaration of the unenforceability of the arbitration clause contained in the PSA.

The PSAs used in all four transactions are virtually identical, as are the arbitration clauses, which are located on the last page, just above the signature line. The language of the arbitration provision reads:

> Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04[A].060.

On January 11, 2008, Quadrant moved to compel arbitration of all claims brought by the Perezes and Ysteboes and to stay trial court proceedings. That same day, Weyerhaeuser and WRECO moved for summary judgment seeking dismissal of all the claims on the merits with prejudice. In opposition to Quadrant's motion to compel arbitration, the Homeowners challenged the validity of the arbitration clause for procedural and substantive unconscionability. The court denied Weyerhaeuser and WRECO's summary judgment motion and Quadrant's motion to compel arbitration and stay proceedings.[4]

Once the trial court consolidated the Lehtinen and Sigafoos lawsuits with the class action, Weyerhaeuser and WRECO moved to compel arbitration of the consolidated cases, as did Quadrant. Again, the Homeowners challenged the enforceability of the arbitration provision and the PSA itself as procedurally and

[4] Weyerhaeuser and WRECO moved for reconsideration, which the trial court also denied.

substantively unconscionable.

On December 2, 2008, the trial court denied the appellants' motions to compel arbitration. The court signed the appellants' proposed order. The order stated two reasons for denial of the motions. First, there were "disputes of fact concerning whether the plaintiffs' PSAs with Quadrant were negotiated contracts or contracts of adhesion." Second, "[a]s a matter of law, the arbitration clauses in the plaintiffs' [PSAs] with Quadrant do not apply to plaintiffs' claims regarding subsequent remediation costs due to construction defects."[5] Quadrant, WRECO, and Weyerhaeuser appealed this order.

On December 3, 2008, appellants filed with this court a motion for stay of trial court proceedings pending appeal. On December 22, 2008, a commissioner granted Quadrant's motion to stay proceedings, finding that the trial court lacked authority under RAP 7.2 to engage in further discovery or pretrial motion practice in the suits subject to this appeal.

DISCUSSION

I. Validity of Agreement to Arbitrate—RCW 7.04A.060

Quadrant[6] contends that the trial court acted ultra vires when it decided that the PSA was unenforceable. Citing specifically to RCW 7.04A.060(3), Quadrant suggests that an arbitrator, not a court, decides issues of enforceability of the underlying contract under the Uniform Arbitration Act,

[5] The Homeowners assert that this issue was not briefed to the trial court, so it is unclear why the appellants included it in their proposed order.
[6] Quadrant refers to all three appellants unless otherwise specified.

chapter 7.04A RCW.

Arbitrability is a question of law we review de novo. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004). The burden of proof is on the party seeking to avoid arbitration. Id. As a threshold matter, the parties dispute whether chapter 7.04A RCW gives the courts or the arbitrator the authority to decide the challenges at issue in this case.[7]

RCW 7.04A.060 provides circumscribed decision-making authority for both the courts and arbitrators:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.
>
> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

RCW 7.04A.060 is based on section 6 of the uniform act. Comment 2 to

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[7] Washington's rules of statutory construction dictate that we must give plain meaning to the words of the statute, and look to other tools for interpretation only if the statute is ambiguous. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Only after we determine the statute is ambiguous may we resort to tools of statutory construction like legislative history. Id. at 202.

Because Washington has adopted the Uniform Arbitration Act, codified in chapter 7.04A RCW, we look to the official comments to the corresponding sections of the Uniform Arbitration Act. RCW 7.04A.901 requires that "[i]n applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." To carry out this mandate, it is appropriate to consider the official comments to the Uniform Arbitration Act, promulgated by the National Conference of Commissioners on Uniform State Laws, without first finding ambiguity in the text. See Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 718, 845 P.2d 987 (1993) (citing the official UCC comments in its analysis of UCC § 1–106); Olmsted v. Mulder, 72 Wn. App. 169, 177, 863 P.2d 1355 (1993) (consulting the official UCC comments to understand the purpose of the particular UCC provision at issue).

section 6 explains that subsection (b) and (c) in the uniform act[8] set up a clear distinction between substantive and procedural arbitrability:

> Subsections (b) and (c) of Section 6 are intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA [Federal Arbitration Act, 99 USC § § 1–14] that, in the absence of an agreement to the contrary, issues of substantive arbitrability, *i.e.*, whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

Unif. Arbitration Act § 6, 7 U.L.A. 24 (2005) (UAA). Under RCW 7.04A.060(2), a court may entertain only a challenge to the validity of the arbitration clause itself, not a challenge to the validity of the contract containing the arbitration clause. McKee v. AT&T Corp., 164 Wn.2d 372, 394, 191 P.3d 845 (2008) (when the validity of the arbitration agreement itself is at issue, a court, not an arbitrator, must first determine whether there was a valid agreement to arbitrate).

In Pinkis v. Network Cinema Corporation, litigated under the substantially similar provision of the FAA, we held that the statutory language did not permit the court to consider the general challenge to the contract. 9 Wn. App. 337, 342, 346, 512 P.2d 751 (1973) The plaintiff had challenged the validity of the entire contract on the basis of fraud in the inducement, and had not made a claim for fraud in the inducement of the arbitration clause itself. Id.; accord McKee, 164 Wn.2d at 394 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)) (contrasting

[8] Washington codifies subsections as (1), (2), and (3) rather than (a), (b), and (c).

McKee's challenge to the arbitration provision to Buckeye, where the challenge was to the validity of the entire contract).

This distinction, between section 2 and 3 of RCW 7.04A.060, also comports with the separability doctrine implied in the statute. Comment 4 to section 6 of the Uniform Arbitration Act further explains that the language in subsection (c), "'whether a contract containing a valid agreement to arbitrate is enforceable,' is intended to follow the 'separability' doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[9]" 7 UAA § 6, U.L.A. at 25. In Prima Paint, the Supreme Court held that the arbitration clause was separable from the contract in which it was made. 388 U.S. at 403–04. There, the plaintiff filed a suit to rescind an agreement for fraud in the inducement. Id. at 408. The alleged fraud was in inducing assent to the contract itself, not specifically to the arbitration clause. Id. at 398, 406. Because Prima Paint had not claimed fraud in the inducement of the arbitration clause itself, the court could not consider it. Id. at 403–04.

We echoed the separability holding of Prima Paint in Pinkis, explaining that "[w]here no claim is made that entry into the arbitration clause itself was fraudulently induced, a broad arbitration clause will encompass arbitration of the claim that the entire contract was induced by fraud." 9 Wn. App. at 341–42; accord Prima Paint, 388 U.S. at 404.

Accordingly, if a party makes a discrete challenge to the enforceability of

[9] 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

the arbitration clause, a court must determine the validity of the clause. RCW 7.04A.060(2). If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. RCW 7.04A.060(2),(3). If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator. Alternatively, if a party challenges only the validity of the contract as a whole, the arbitrator has the authority under RCW 7.04A.060(3) to determine the validity of the contract.[10]

II. Unconscionability

Agreements may be either substantively or procedurally unconscionable. Zuver, 153 Wn.2d at 303.

A. Substantive Unconscionability

The Homeowners allege, below and on appeal, that the arbitration clause is substantively unconscionable. Because this challenge is specific to the clause itself, and not to the PSA, the court has the authority to entertain it. RCW 7.04A.060(2).

Substantive unconscionability alone is sufficient to support a finding of

[10] This is consistent with the court's role under RCW 7.04A.070(1), when presented with a motion to compel arbitration:

> On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. *Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate.* If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

(emphasis added). Under this subsection, the court must order the parties to arbitrate *unless* it finds that there is no enforceable agreement to arbitrate.

unconscionability. Adler v. Fred Lind Manor, 153 Wn.2d 331, 346–47, 103 P.3d 773 (2004). Substantive unconscionability involves those cases where a clause or term in the contract is one-sided or overly harsh. Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 519, 210 P.3d 318 (2009). An arbitration clause may be substantively unconscionable if it prohibits class actions, either by its express terms or in effect. Dix v. ICT Group, Inc., 160 Wn.2d 826, 837, 161 P.3d 1016 (2007) (holding that a forum selection clause that in effect precluded class actions was unenforceable); Scott v. Cingular Wireless, 160 Wn.2d 843, 855–57, 161 P.3d 1000 (2007) (holding that an arbitration provision that expressly precluded class actions violated the policy behind the CPA and was therefore unconscionable).

The Homeowners argue that the clause could prevent them from resolving their claims in a single class action. However, the language of the arbitration clause at issue here does not prohibit class actions, either explicitly[11] or in effect. See, e.g., Scott, 160 Wn.2d at 857 (where the clause barring class action both in arbitration and in court was exculpatory, leaving the consumer without remedy). The Homeowners have cited no authority to suggest that resolution of class actions in arbitration is substantively unconscionable or otherwise barred. The implication of the language in Scott is that class action arbitration is not

[11] The clause reads:

> Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04[A].060.

substantively unconscionable.

An arbitration clause may also be substantively unconscionable if it "triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims." Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 464, 45 P.3d 594 (2002). In Mendez, where Mendez had submitted an affidavit describing his financial circumstances and the cost of arbitration he faced, the court found the cost of arbitration had the practical effect of preventing Mendez from pursuing his claim. Id. at 465, 471. Here, the only evidence suggesting the Homeowners face financial difficulty are their identical declarations that requiring them to proceed in two forums would be financially ruinous. If the arbitration clause is valid, the Homeowners would pursue only the contract claims in arbitration. Only noncontract claims would remain in court absent agreement of the parties to the contrary. Further, the Homeowners did not present evidence of the cost of arbitration as compared to the value of their claim, necessary to satisfy the burden recognized in Mendez. See id. at 465 (comparing burden of the $2,000 expense up front to resolve a $1,500 dispute). There is insufficient evidence on which to base an argument of substantive unconscionability under Mendez.

We hold the arbitration clause is not substantively unconscionable.

B. Procedural Unconscionability

Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction including the manner in which

the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in fine print. Torgerson, 166 Wn.2d at 518–19; Zuver, 153 Wn.2d at 303. The three factors should not be applied mechanically without regard to whether in truth a meaningful choice existed. Torgerson, 166 Wn.2d at 518–19; Zuver, 153 Wn.2d at 303.

Whether a contract is one of adhesion depends upon an analysis of the following factors: "(1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take it or leave it basis, and (3) whether there was no true equality of bargaining power between the parties." Zuver, 153 Wn.2d at 304 (internal quotation marks omitted) (quoting Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993)). However, an adhesion contract is not necessarily procedurally unconscionable. Adler, 153 Wn.2d at 348. The key inquiry is whether the party lacked meaningful choice, returning the focus to the procedural unconscionability analysis.[12] See Torgerson, 166 Wn.2d at 519; Zuver, 153 Wn.2d at 305.

In Torgerson, the Supreme Court considered whether the limitation on

[12] Quadrant contends the trial court erred by relying on procedural unconscionability alone to hold that the arbitration clauses are unenforceable. This argument is inaccurate. The court in Adler specifically declined to consider whether procedural unconscionability alone will support a claim of unconscionability. Adler, 153 Wn.2d at 347. However, the court in Zuver, Adler's companion case, stated that the key inquiry for finding procedural unconscionability is whether the aggrieved party lacked meaningful choice, suggesting that the possibility of invalidating a contract based on procedural unconscionability is not forclosed. Zuver, 153 Wn.2d at 305; see also Torgerson, 166 Wn.2d at 519.

remedies in a real estate contract was unconscionable. 166 Wn.2d at 513, 517. It noted that the unconscionability doctrine is applicable beyond the Uniform Commercial Code[13] (UCC) context. Id. at 518 (citing Yakima County, 122 Wn.2d at 391); see also Baker v. City of Seattle, 79 Wn.2d 198, 201–02, 484 P.2d 405 (1971) (recognizing that the UCC can be applied to common law contract analysis by analogy, especially when evaluating unconscionability). Further, it stated that the Court of Appeals had erred by failing to consider the buyers' unconscionability claims. Torgerson, 166 Wn.2d at 518. Even though it concluded that these claims were meritless, it explained that whether a transaction is a real estate, consumer, or commercial deal, "the principles of the unconscionability doctrine remain the same." Id. at 518, 522. However, it declined to use the case as "the launch pad for an analysis of when the doctrine of unconscionability applies to real estate transactions." Id. at 523. We conclude that unconscionability may be applied in some circumstances involving real estate contracts.

Here, the Homeowners have specifically challenged the arbitration clause for procedural unconscionability, requesting in their eighth cause of action that the court declare the unenforceability of the arbitration clause. The Homeowners' challenge to the validity of the arbitration clause rests on their argument that the PSAs themselves were invalid for procedural unconscionability as contracts of adhesion.

[13] RCW 62A.2-719(3) (dealing with unconscionability); RCW 62A.2-719(2) (dealing with failure of essential purpose).

They claimed they were presented with Quadrant's proprietary electronic PSA on a "take it or leave it" basis, and were not allowed to modify the arbitration clause in any way—it was a boilerplate provision. In addition, they claimed the sales representatives withheld and concealed information about prior lawsuits against Quadrant, and that Quadrant used high-pressure tactics to force the Homeowners to sign the agreement immediately. Quadrant representatives provided the PSAs electronically to the Homeowners at the initial sales appointment, informing them that their ability to purchase a home required immediate agreement to all of Quadrant's terms.

The Homeowners did not have a chance to review or question the provisions of the PSA before signing. Further, they claim they could not seek advice regarding the PSA's provisions, including the arbitration clause, as they were not given a hard copy to read, question, or take to a lawyer for review until days after signing. Finally, when the Homeowners requested information about other Quadrant homeowners' experiences, Quadrant representatives withheld material information, precluding them from making an informed decision.

The facts alleged relate to the PSA as a whole. The issue of the PSA's procedural unconscionability is a matter reserved for the arbitrator. RCW 7.04A.060(3). The only facts relating specifically to the arbitration clause are that it was a boilerplate provision and could not be deleted from the agreement. This is insufficient to establish procedural unconscionability.

Because the arbitration clause is not substantively or procedurally

unconscionable, no ground in law or equity has been established on which to revoke the arbitration clause, so it must be enforced. RCW 7.04A.060(1).

III. Scope of the Arbitration Clause

The parties dispute which of the Homeowners' claims are subject to arbitration, whether WRECO and Weyerhaeuser are bound by the arbitration clause, and whether the children's claims are subject to arbitration.

The arbitration act allocates authority to the courts to decide whether "a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). However, the trial court made only a partial determination concerning which claims were subject to the arbitration clause.[14] The Homeowners brought the following causes of action: outrage, fraud, unfair business practices act[15] violation, negligence for personal injury and property damage, negligent misrepresentation, rescission, and breach of warranty. They also requested a declaration of unenforceability of the arbitration clause.

A. Contract and Tort Claims

The economic loss rule maintains the fundamental boundaries of tort and contract law. Alejandre v. Bull, 159 Wn.2d 674, 682, 153 P.3d 864 (2007). The rule ensures that a party to a contract cannot recover in tort the risk the parties had already allocated through contract. Id. at 682–83.

[T]he purpose of the economic loss rule is to bar recovery for

[14] The court's order only stated that "[a]s a matter of law, the arbitration clauses in the plaintiffs' [PSAs] with Quadrant do not apply to plaintiffs' claims regarding subsequent remediation costs due to construction defects."

[15] Ch. 19.86 RCW.

> alleged breach of tort duties where a contractual relationship exists and the losses are economic losses. If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims. . . . The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to other property.

Id. at 683–84 (citations omitted).

The economic loss rule applies to tort claims brought by homebuyers. Id. at 685 ("[W]here defects in construction of residences and other buildings are concerned, economic losses are generally distinguished from physical harm or property damage to property other than the defective product or property. The distinction is drawn based on the nature of the defect and the manner in which damage occurred."). Purely economic damages are those evidenced by deterioration. Id. at 685 (characterizing the injury complained of, a failed septic system, as an economic loss because it was evidenced by internal deterioration). Further, the economic loss rule bars tort-based recovery for negligent and intentional misrepresentation (fraud). Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 198, 204–05, 194 P.3d 280 (2008), review granted in part, 166 Wn.2d 1015 (2009).

We do not read the arbitration clause to include arbitration of pure tort claims. Therefore, all of the Homeowners' claims involving personal injury and damage to property not covered by the contract are tort claims outside the scope of the arbitration clause. All of the Homeowners' contract claims or other claims involving economic loss flow from the contract and are therefore covered by the

arbitration clause.

B. Parent Corporations

The parties dispute whether WRECO and Weyerhaeuser waived their right to arbitrate by moving for summary judgment. WRECO and Weyerhaeuser argue that their conduct other than their initial motion for summary judgment has been consistent with an intent to pursue arbitration.

A party may waive the right to arbitrate by moving for summary judgment on the merits. See, e.g., Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn. App. 388, 395–96, 775 P.2d 960 (1989) (where the court held that the teachers' motion for summary judgment on the issue of liability, after the district had moved for summary judgment on the arbitration issue, demonstrated their intent to proceed with the action in court, so they had waived tier right to arbitrate). However, a waiver of arbitration cannot be found if there is conduct suggesting a lack of intention to forego the right to arbitrate. Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn. App. 59, 62, 621 P.2d 791 (1980).

WRECO and Weyerhaeuser moved for summary judgment on January 11, 2008, alleging they were not properly parties to the lawsuit, as the Homeowners had not pleaded facts that implicated their liability. The court denied both the motion and, on March 17, 2008, the motion for reconsideration. The basis for the summary judgment was not the merits of the issues, but whether WRECO and Weyerhaeuser were proper parties. Before reaching the merits of the Homeowners' claims, there must be a determination of the

existence of an agreement to arbitrate and who the parties to that agreement are. We hold that a party may challenge before the court whether they are properly parties to an arbitration agreement, or whether a basis exists to revoke the arbitration agreement, without waiving the substantive right to invoke the arbitration clause if they lose these challenges.

The parties also dispute whether WRECO and Weyerhaeuser may enforce the arbitration clause as nonsignatories. WRECO and Weyerhaeuser may enforce the arbitration clause as nonsignatories, as a person who is not a party to an agreement to arbitrate may be bound to the agreement by ordinary principles of contract and agency. Powell v. Sphere Drake Ins. PLC, 97 Wn. App. 890, 892, 988 P.2d 12 (1999); McClure v. Davis Wright Tremaine, 77 Wn. App. 312, 315, 890 P.2d 466 (1995) ("[E]ven when it is not explicitly provided for in an arbitration agreement, some nonsignatories can compel arbitration under the doctrine of equitable estoppel or under normal contract and agency principles."). Quadrant is a subsidiary of WRECO, which in turn is a subsidiary of Weyerhaeuser. When the charges against a parent and subsidiary are based on the same facts, as is the case here, and are inherently inseparable, a court may order arbitration of claims against the parent even though the parent is not a party to the arbitration agreement. J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA, 863 F.2d 315, 320–21 (4th Cir. 1988). The claims against Quadrant that the court determines are subject to arbitration are also arbitrable as to WRECO and Weyerhaeuser.

After the court denied their summary judgment motion, WRECO and Weyerhaeuser joined in Quadrant's motion to compel arbitration. This conduct demonstrates they did not intend to waive their right to arbitrate subsequent to the initial summary judgment.

We hold the defendants have not waived the right to arbitrate.

C. Children's Claims

A person not a party to an agreement to arbitrate may be bound to the agreement by ordinary principles of contract and agency. Powell, 97 Wn. App. at 892. When a nonsignatory plaintiff bases its right to sue on the contract, rather than an independent basis such as a statute or some other theory outside the contract, the provision requiring arbitration must be observed. Id. at 896–97.

Accordingly, all of the children's claims based in contract are subject to arbitration, and all claims for personal injury or injury to property not covered by the contract are not subject to arbitration, thus bound by the same scope analysis the trial court will conduct for the parents' claims.[16]

We remand[17] to the trial court for proceedings consistent with this opinion.

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[16] Quadrant contends that the children are not properly named plaintiffs, as they have not appeared by guardian under RCW 4.08.050. It is not clear from the record whether this issue has merit or is before us. Upon remand, the trial court should resolve this issue.

[17] The court's order stated that there were "disputes of fact concerning whether the plaintiffs' [PSA] with Quadrant were negotiated contracts or contracts of adhesion." Notwithstanding that the trial court did not have authority to hear the Homeowners' challenge to the PSA as a whole, the determination that an agreement may be a contract of adhesion is not sufficient to revoke the arbitration agreement. It is merely a step in the determination of procedural unconscionability. Under the statute, the trial court must conduct any necessary proceeding to resolve the questions of fact to determine as a matter of law whether a ground exists in law or equity to revoke the arbitration clause. RCW 7.04A.060(1), (2). Further, consideration of the unconscionability of the PSA, as opposed to strictly the arbitration clause, was error under RCW 7.04A.060(2), which gives courts the authority to consider only the validity of the agreement to arbitrate.

Appelwick, J.

WE CONCUR:

Dwyer, J.

Mann, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON and HANNAH, Respondents, v. THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation, Appellants.	No. 62700-7-I DIVISION ONE PUBLISHED OPINION FILED: December 28, 2009

Appelwick, J. — Four families who purchased homes built by Quadrant Corporation sued Quadrant and its parent corporations, Weyerhaeuser Real Estate Company and Weyerhaeuser Corporation, for fraud, negligence, negligent misrepresentation, rescission, and a declaration of the unenforceability

of the arbitration clause for unconscionability. The purchase and sale agreement (PSA) used in all four transactions contains a broad mandatory arbitration provision covering any controversy or claim arising out of or relating to breach of the PSA or any claimed defect. Quadrant appeals the order denying its motion to stay proceedings and to compel arbitration as a matter of right under RCW 7.04A.280(1)(a). Quadrant contends that an arbitrator, not a court, must decide whether the PSA was invalid for unconscionability.

RCW 7.04A.060(2) grants the court the authority to decide whether an agreement to arbitrate exists, so the trial court did not err in considering the validity of the arbitration clause. However, the facts alleged by the Homeowners do not support a finding that the arbitration clause itself was procedurally or substantively unconscionable. Under the arbitration statute, the arbitrator must decide whether a contract containing a valid agreement to arbitrate is enforceable. Because the arbitration clause itself is valid, we reverse and remand for the trial court to refer the claims to arbitration.

FACTS

Respondents (the Homeowners) purchased houses designed, built, and sold by appellants The Quadrant Corporation, Weyerhaeuser Real Estate Company (WRECO), and Weyerhaeuser Company. The respondents are four married couples: Donia Townsend and Bob Perez (the Perezes), Paul and Jo Ann Ysteboe, Vivian and Tony Lehtinen, Jon and Crista Sigafoos, and the Lehtinen and Sigafoos children.[1] Quadrant is a wholly owned subsidiary of

WRECO, and WRECO is a wholly owned subsidiary of Weyerhaeuser. Quadrant designs, develops, builds, and markets planned residential communities throughout Washington.

The Homeowners' declarations contain descriptions of the purchasing process, wherein they allege that Quadrant presented them with the PSA on a "take it or leave it" basis, used high-pressure sales tactics, withheld material information about other lawsuits against it, and precluded the Homeowners from reviewing the PSA before signing it electronically.[2] After purchasing and living in their homes and discovering the alleged defects, the Homeowners alleged that they had not received the homes they bargained for, paid for, or expected, as the homes were built in a rapid, assembly line style, allowing only 54 total working days for the entire production of each home. The Homeowners allege that the reckless construction process resulted in numerous construction defects, caused injury in the form of mold growth, pests, and poisonous gases, and violated the Consumer Protection Act[3] (CPA). The Homeowners sued the defendants for fraud, outrage, violation of the CPA, negligence, negligent misrepresentation, rescission, breach of warranty, and a declaration of the unenforceability of the arbitration clause contained in the PSA.

The PSAs used in all four transactions are virtually identical, as are the

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[1] Initially, the Perezes and Ysteboes filed a class action complaint against Quadrant, WRECO, and Weyerhaeuser. The King County Superior Court consolidated the actions brought by the Sigafooses and Lehtinens into the Perez/Ysteboe class action suit in February 2008.

[2] The facts presented here are those alleged by the plaintiffs, as the trial court has not entered findings.

[3] Ch. 19.86 RCW.

arbitration clauses, which are located on the last page, just above the signature line. The language of the arbitration provision reads:

> Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04[A].060.

On January 11, 2008, Quadrant moved to compel arbitration of all claims brought by the Perezes and Ysteboes and to stay trial court proceedings. That same day, Weyerhaeuser and WRECO moved for summary judgment seeking dismissal of all the claims on the merits with prejudice. In opposition to Quadrant's motion to compel arbitration, the Homeowners challenged the validity of the arbitration clause for procedural and substantive unconscionability. The court denied Weyerhaeuser and WRECO's summary judgment motion and Quadrant's motion to compel arbitration and stay proceedings.[4]

Once the trial court consolidated the Lehtinen and Sigafoos lawsuits with the class action, Weyerhaeuser and WRECO moved to compel arbitration of the consolidated cases, as did Quadrant. Again, the Homeowners challenged the enforceability of the arbitration provision and the PSA itself as procedurally and substantively unconscionable.

On December 2, 2008, the trial court denied the appellants' motions to compel arbitration. The court signed the appellants' proposed order. The order stated two reasons for denial of the motions. First, there were "disputes of fact

[4] Weyerhaeuser and WRECO moved for reconsideration, which the trial court also denied.

concerning whether the plaintiffs' PSAs with Quadrant were negotiated contracts or contracts of adhesion." Second, "[a]s a matter of law, the arbitration clauses in the plaintiffs' [PSAs] with Quadrant do not apply to plaintiffs' claims regarding subsequent remediation costs due to construction defects."[5] Quadrant, WRECO, and Weyerhaeuser appealed this order.

On December 3, 2008, appellants filed with this court a motion for stay of trial court proceedings pending appeal. On December 22, 2008, a commissioner granted Quadrant's motion to stay proceedings, finding that the trial court lacked authority under RAP 7.2 to engage in further discovery or pretrial motion practice in the suits subject to this appeal.

DISCUSSION

I. Validity of Agreement to Arbitrate—RCW 7.04A.060

Quadrant[6] contends that the trial court acted ultra vires when it decided that the PSA was unenforceable. Citing specifically to RCW 7.04A.060(3), Quadrant suggests that an arbitrator, not a court, decides issues of enforceability of the underlying contract under the Uniform Arbitration Act, chapter 7.04A RCW.

Arbitrability is a question of law we review de novo. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004). The burden of proof is on the party seeking to avoid arbitration. Id. As a threshold matter, the

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parties dispute whether chapter 7.04A RCW gives the courts or the arbitrator the authority to decide the challenges at issue in this case.[7]

RCW 7.04A.060 provides circumscribed decision-making authority for both the courts and arbitrators:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.
>
> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

RCW 7.04A.060 is based on section 6 of the uniform act. Comment 2 to section 6 explains that subsection (b) and (c) in the uniform act[8] set up a clear distinction between substantive and procedural arbitrability:

> Subsections (b) and (c) of Section 6 are intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA [Federal Arbitration Act, 9 USC §§

[7] Washington's rules of statutory construction dictate that we must give plain meaning to the words of the statute and look to other tools for interpretation only if the statute is ambiguous. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Only after we determine the statute is ambiguous may we resort to tools of statutory construction like legislative history. Id. at 202.

Because Washington has adopted the Uniform Arbitration Act, codified in chapter 7.04A RCW, we look to the official comments to the corresponding sections of the Uniform Arbitration Act. RCW 7.04A.901 requires that "[i]n applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." To carry out this mandate, it is appropriate to consider the official comments to the Uniform Arbitration Act, promulgated by the National Conference of Commissioners on Uniform State Laws, without first finding ambiguity in the text. See Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 718, 845 P.2d 987 (1993) (citing the official Uniform Commercial Code (UCC) comments in its analysis of UCC § 1–106); Olmsted v. Mulder, 72 Wn. App. 169, 177, 863 P.2d 1355 (1993) (consulting the official UCC comments to understand the purpose of the particular UCC provision at issue).

[8] Washington codifies subsections as (1), (2), and (3) rather than (a), (b), and (c).

> 1–14] that, in the absence of an agreement to the contrary, issues of substantive arbitrability, *i.e.*, whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

Unif. Arbitration Act (UAA) § 6 cmt. 2, 7 U.L.A. 24 (2005). Under RCW 7.04A.060(2), a court may entertain only a challenge to the validity of the arbitration clause itself, not a challenge to the validity of the contract containing the arbitration clause. McKee v. AT&T Corp., 164 Wn.2d 372, 394, 191 P.3d 845 (2008) (when the validity of the arbitration agreement itself is at issue, a court, not an arbitrator, must first determine whether there was a valid agreement to arbitrate).

In Pinkis v. Network Cinema Corp., litigated under the substantially similar provision of the FAA, we held that the statutory language did not permit the court to consider the general challenge to the contract. 9 Wn. App. 337, 342, 346, 512 P.2d 751 (1973). The plaintiff had challenged the validity of the entire contract on the basis of fraud in the inducement. Id. He had not made a claim for fraud in the inducement of the arbitration clause itself. Id.; accord McKee, 164 Wn.2d at 394 (contrasting McKee's challenge to the arbitration provision to Buckeye, where the challenge was to the validity of the entire contract) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)).

This distinction between subsections 2 and 3 of RCW 7.04A.060 also

comports with the separability doctrine implied in the statute. Comment 4 to section 6 of the Uniform Arbitration Act further explains that the language in subsection (c), "'whether a contract containing a valid agreement to arbitrate is enforceable,' is intended to follow the 'separability' doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[9]" UAA § 6 cmt. 4, 7 U.L.A. at 25. In Prima Paint, the Supreme Court held that the arbitration clause was separable from the contract in which it was made. 388 U.S. at 403–04. There, the plaintiff filed a suit to rescind an agreement for fraud in the inducement. Id. at 408. The alleged fraud was in inducing assent to the contract itself, not specifically to the arbitration clause. Id. at 398, 406. Because Prima Paint had not claimed fraud in the inducement of the arbitration clause itself, the court could not consider it. Id. at 403–04.

We echoed the separability holding of Prima Paint in Pinkis, explaining that "[w]here no claim is made that entry into the arbitration clause itself was fraudulently induced, a broad arbitration clause will encompass arbitration of the claim that the entire contract was induced by fraud." 9 Wn. App. at 341–42; accord Prima Paint, 388 U.S. at 404.

Accordingly, if a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. RCW 7.04A.060(2). If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration

[9] 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

clause must go to arbitration. RCW 7.04A.060(2), (3). If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator. Alternatively, if a party challenges only the validity of the contract as a whole, the arbitrator has the authority under RCW 7.04A.060(3) to determine the validity of the contract.[10]

II. Unconscionability

Agreements may be either substantively or procedurally unconscionable. Zuver, 153 Wn.2d at 303.

A. Substantive Unconscionability

The Homeowners allege, below and on appeal, that the arbitration clause is substantively unconscionable. Because this challenge is specific to the clause itself, and not to the PSA, the court has the authority to entertain it. RCW 7.04A.060(2).

Substantive unconscionability alone is sufficient to support a finding of unconscionability. Adler v. Fred Lind Manor, 153 Wn.2d 331, 346–47, 103 P.3d 773 (2004). Substantive unconscionability involves those cases where a clause or term in the contract is one-sided or overly harsh. Torgerson v. One Lincoln

[10] This is consistent with the court's role when presented with a motion to compel arbitration:

> On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. *Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate.* If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

RCW 7.04A.070(1) (emphasis added). Under this subsection, the court must order the parties to arbitrate *unless* it finds that there is no enforceable agreement to arbitrate.

Tower, LLC, 166 Wn.2d 510, 519, 210 P.3d 318 (2009). An arbitration clause may be substantively unconscionable if it prohibits class actions, either by its express terms or in effect. Dix v. ICT Group, Inc., 160 Wn.2d 826, 837, 161 P.3d 1016 (2007) (holding that a forum selection clause that in effect precluded class actions was unenforceable); Scott v. Cingular Wireless, 160 Wn.2d 843, 855–57, 161 P.3d 1000 (2007) (holding that an arbitration provision that expressly precluded class actions violated the policy behind the CPA and was therefore unconscionable).

The Homeowners argue that the clause could prevent them from resolving their claims in a single class action. However, the language of the arbitration clause at issue here does not prohibit class actions, either explicitly[11] or in effect. See, e.g., Scott, 160 Wn.2d at 857 (where the clause barring class action both in arbitration and in court was exculpatory, leaving the consumer without remedy). The Homeowners have cited no authority to suggest that resolution of class actions in arbitration is substantively unconscionable or otherwise barred. The implication of the language in Scott is that class action arbitration is not substantively unconscionable.

An arbitration clause may also be substantively unconscionable if it "triggers costs effectively depriving a plaintiff of limited pecuniary means of a

[11] The clause reads:

> Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04[A].060.

forum for vindicating claims." Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 464, 45 P.3d 594 (2002). In Mendez, where Mendez had submitted an affidavit describing his financial circumstances and the cost of arbitration he faced, the court found the cost of arbitration had the practical effect of preventing Mendez from pursuing his claim. Id. at 465, 471. Here, the only evidence suggesting the Homeowners face financial difficulty are their identical declarations that requiring them to proceed in two forums would be financially ruinous. This presumes their tort claims are not subject to arbitration, a notion we reject infra. Further, the Homeowners did not present evidence of the cost of arbitration as compared to the value of their claim, necessary to satisfy the burden recognized in Mendez. See id. at 465 (comparing burden of the $2,000 expense up front to resolve a $1,500 dispute). There is insufficient evidence on which to base an argument of substantive unconscionability under Mendez.

We hold the arbitration clause is not substantively unconscionable.

B. Procedural Unconscionability

Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in fine print. Torgerson, 166 Wn.2d at 518–19; Zuver, 153 Wn.2d at 303. The three factors should not be applied mechanically without regard to whether in truth a meaningful choice existed. Torgerson, 166 Wn.2d at 518–19; Zuver,

153 Wn.2d at 303.

Whether a contract is one of adhesion depends upon an analysis of the following factors: "'(1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take it or leave it basis, and (3) whether there was no true equality of bargaining power between the parties.'" Zuver, 153 Wn.2d at 304 (internal quotation marks omitted) (quoting Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993)). However, an adhesion contract is not necessarily procedurally unconscionable. Adler, 153 Wn.2d at 348. The key inquiry is whether the party lacked meaningful choice, returning the focus to the procedural unconscionability analysis.[12] See Torgerson, 166 Wn.2d at 519; Zuver, 153 Wn.2d at 305.

In Torgerson, the Supreme Court considered whether the limitation on remedies in a real es tate contract was unconscionable. 166 Wn.2d at 513, 517. It noted that the unconscionability doctrine is applicable beyond the Uniform Commercial Code[13] (UCC) context. Id. at 518 (citing Yakima County, 122 Wn.2d at 391); see also Baker v. City of Seattle, 79 Wn.2d 198, 201–02, 484 P.2d 405

[12] Quadrant contends the trial court erred by relying on procedural unconscionability alone to hold that the arbitration clauses are unenforceable. This argument is inaccurate. The court in Adler specifically declined to consider whether procedural unconscionability alone will support a claim of unconscionability. 153 Wn.2d at 347. However, the court in Zuver, Adler's companion case, stated that the key inquiry for finding procedural unconscionability is whether the aggrieved party lacked meaningful choice, suggesting that the possibility of invalidating a contract based on procedural unconscionability is not forclosed. Zuver, 153 Wn.2d at 305; see also Torgerson, 166 Wn.2d at 519.

[13] RCW 62A.2-719(3) (dealing with unconscionability); (2) (dealing with failure of essential purpose).

(1971) (recognizing that the UCC can be applied to common law contract analysis by analogy, especially when evaluating unconscionability). Further, it stated that the Court of Appeals had erred by failing to consider the buyers' unconscionability claims. Torgerson, 166 Wn.2d at 518. Even though it concluded that these claims were meritless, it explained that whether a transaction is a real estate, consumer, or commercial deal, "the principles of the unconscionability doctrine remain the same." Id. at 522. However, it declined to use the case as "the launch pad for an analysis of when the doctrine of unconscionability applies to real estate transactions." Id. at 523. We conclude that unconscionability may be applied in some circumstances involving real estate contracts.

Here, the Homeowners have specifically challenged the arbitration clause for procedural unconscionability, requesting in their eighth cause of action that the court declare the unenforceability of the arbitration clause. The Homeowners' challenge to the validity of the arbitration clause rests on their argument that the PSAs themselves were invalid for procedural unconscionability as contracts of adhesion.

They claimed they were presented with Quadrant's proprietary electronic PSA on a "take it or leave it" basis and were not allowed to modify the arbitration clause in any way—it was a boilerplate provision. In addition, they claimed the sales representatives withheld and concealed information about prior lawsuits against Quadrant, and that Quadrant used high-pressure tactics to force the

Homeowners to sign the agreement immediately. Quadrant representatives provided the PSAs electronically to the Homeowners at the initial sales appointment, informing them that their ability to purchase a home required immediate agreement to all of Quadrant's terms.

The Homeowners did not have a chance to review or question the provisions of the PSA before signing. Further, they claim they could not seek advice regarding the PSA's provisions, including the arbitration clause, as they were not given a hard copy to read, question, or take to a lawyer for review until days after signing. Finally, when the Homeowners requested information about other Quadrant homeowners' experiences, Quadrant representatives withheld material information, precluding them from making an informed decision.

The facts alleged relate to the PSA as a whole. The issue of the PSA's procedural unconscionability is a matter reserved for the arbitrator. RCW 7.04A.060(3). The only facts relating specifically to the arbitration clause are that it was a boilerplate provision and could not be deleted from the agreement. This is insufficient to establish procedural unconscionability.

Because the arbitration clause is not substantively or procedurally unconscionable, no ground in law or equity has been established on which to revoke the arbitration clause, so it must be enforced. RCW 7.04A.060(1).

III. Scope of the Arbitration Clause

The parties dispute which of the Homeowners' claims are subject to arbitration, whether WRECO and Weyerhaeuser are bound by the arbitration

clause, and whether the children's claims are subject to arbitration.

The arbitration act allocates authority to the courts to decide whether "a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). However, the trial court made only a partial determination concerning which claims were subject to the arbitration clause.[14] The Homeowners brought the following causes of action: outrage, fraud, unfair business practices act[15] violation, negligence for personal injury and property damage, negligent misrepresentation, rescission, and breach of warranty. They also requested a declaration of unenforceability of the arbitration clause.

A. Arbitration of Tort Claims

Quadrant contends the broad language of the arbitration clause covers all of the Homeowners' claims. The Homeowners contend they did not intend for the arbitration clause to cover their personal injury and other tort claims. The language of the arbitration provision reads:

> Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04[A].060.

Four principles guide our analysis of whether the parties agreed to arbitrate a particular dispute: (1) the duty to arbitrate arises from the contract; (2) a

[14] The court's order only stated that "[a]s a matter of law, the arbitration clauses in the plaintiffs' [PSAs] with Quadrant do not apply to plaintiffs' claims regarding subsequent remediation costs due to construction defects."

[15] Ch. 19.86 RCW.

question of arbitrability is a judicial question unless the parties clearly provide otherwise; (3) a court should not reach the underlying merits of the controversy when determining arbitrability; and (4) as a matter of policy, courts favor arbitration of disputes. Mendez, 111 Wn. App. at 455–56 (quoting Stein v. Geonerco, Inc., 105 Wn. App. 41, 45–46, 17 P.3d 1266 (2001)). If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration, unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute. Id. at 456.

This court has stated that an arbitration clause that encompasses any controversy "relating to" a contract is broader than language covering only claims "arising out" of a contract. McClure v. Davis Wright Tremaine, 77 Wn. App. 312, 314, 890 P.2d 466 (1995). The arbitration clause at issue here contains both phrases, suggesting it has a very broad scope. There is no bar in Washington to arbitration of tort claims, as long as the language in the arbitration clause does not preclude it. See, e.g., In re Jean F. Gardner Amended Blind Trust, 117 Wn. App. 235, 235–36, 70 P.3d 168 (2003) (affirming the trial court's decision to compel arbitration of negligence and breach of fiduciary duty claims).

In light of the policy favoring arbitration and the broad language in the clause itself, we read it as requiring arbitration of tort claims.

B. Arbitration of Nonsignatory Children's Claims

A person not a party to an agreement to arbitrate may be bound to the agreement by ordinary principles of contract and agency. Powell v. Sphere Drake Ins. PLC, 97 Wn. App. 890, 892, 988 P.2d 12 (1999). When a nonsignatory plaintiff bases its right to sue on the contract, rather than an independent basis such as a statute or some other theory outside the contract, the provision requiring arbitration must be observed. Id. at 896–97 (quoting Aasma v. Am. S.S. Owners Mut. Prot. & Indem. Assn., 95 F.3d 400, 405 (6th Cir. 1996)).

There is no distinction in the complaints between the childrens' claims and the parents' claims. Although some of the childrens' claims sound in tort, the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of the home. The claims relate to the PSA. Accordingly, all of the children's claims are bound by the same scope analysis the trial court will conduct for the parents' claims.[16]

C. Waiver by Parent Corporations

The parties dispute whether WRECO and Weyerhaeuser waived their right to arbitrate by moving for summary judgment. WRECO and Weyerhaeuser argue that their conduct other than their initial motion for summary judgment has been consistent with an intent to pursue arbitration.

A party may waive the right to arbitrate by moving for summary judgment

[16] Quadrant contends that the children are not properly named plaintiffs, as they have not appeared by guardian under RCW 4.08.050. It is not clear from the record whether this issue has merit or is before us. Upon remand, the trial court should resolve this issue.

on the merits. See, e.g., Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn. App. 388, 395–96, 775 P.2d 960 (1989) (where the court held that the teachers' motion for summary judgment on the issue of liability, after the district had moved for summary judgment on the arbitration issue, demonstrated their intent to proceed with the action in court, so they had waived tier right to arbitrate). However, a waiver of arbitration cannot be found if there is conduct suggesting a lack of intention to forego the right to arbitrate. Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn. App. 59, 62, 621 P.2d 791 (1980).

WRECO and Weyerhaeuser moved for summary judgment on January 11, 2008, alleging they were not properly parties to the lawsuit, as the Homeowners had not pleaded facts that implicated their liability. The court denied both the motion and, on March 17, 2008, the motion for reconsideration. The basis for the summary judgment was not the merits of the issues, but whether WRECO and Weyerhaeuser were proper parties. Before reaching the merits of the Homeowners' claims, there must be a determination of the existence of an agreement to arbitrate and who the parties to that agreement are. We hold that a party may challenge before the court whether they are properly parties to an arbitration agreement, or whether a basis exists to revoke the arbitration agreement, without waiving the substantive right to invoke the arbitration clause if they lose these challenges.

The parties also dispute whether WRECO and Weyerhaeuser may enforce the arbitration clause as nonsignatories. WRECO and Weyerhaeuser

may enforce the arbitration clause as nonsignatories, as a person who is not a party to an agreement to arbitrate may be bound to the agreement by ordinary principles of contract and agency. Powell, 97 Wn. App. at 892; McClure, 77 Wn. App. at 315 ("[E]ven when it is not explicitly provided for in an arbitration agreement, some nonsignatories can compel arbitration under the doctrine of equitable estoppel or under normal contract and agency principles."). Quadrant is a subsidiary of WRECO, which in turn is a subsidiary of Weyerhaeuser. When the charges against a parent and subsidiary are based on the same facts, as is the case here, and are inherently inseparable, a court may order arbitration of claims against the parent even though the parent is not a party to the arbitration agreement. J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA, 863 F.2d 315, 320–21 (4th Cir. 1988). The claims against Quadrant that the court determines are subject to arbitration are also arbitrable as to WRECO and Weyerhaeuser.

After the court denied their summary judgment motion, WRECO and Weyerhaeuser joined in Quadrant's motion to compel arbitration. This conduct demonstrates they did not intend to waive their right to arbitrate subsequent to the initial summary judgment.

We hold the defendants have not waived the right to arbitrate.

We remand[17] to the trial court for proceedings consistent with this opinion.

[17] The court's order stated that there were "disputes of fact concerning whether the plaintiffs' [PSA] with Quadrant were negotiated contracts or contracts of adhesion." Notwithstanding that the trial court did not have authority to hear the Homeowners' challenge to the PSA as a whole, the determination that an agreement may be a contract of adhesion is not sufficient to revoke the arbitration agreement. It is merely a step in the determination of procedural unconscionability.

WE CONCUR:

Under the statute, the trial court must conduct any necessary proceeding to resolve the questions of fact to determine as a matter of law whether a ground exists in law or equity to revoke the arbitration clause. RCW 7.04A.060(1), (2). Further, consideration of the unconscionability of the PSA, as opposed to strictly the arbitration clause, was error under RCW 7.04A.060(2), which gives courts the authority to consider only the validity of the agreement to arbitrate.

Appendix C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON and HANNAH, Respondents, v. THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation, Appellants.	No. 62700-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondents, the homeowners, having filed their motion for reconsideration of the opinion filed on December 28, 2009 herein, and a majority of

the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 8th day of February, 2010.

Judge